



October 31, 2003

Via Electronic Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, D.C. 20554

Re: ET Docket 95-18, ET Docket 00-258 & IB Docket 99-81

Dear Ms. Dortch:

In its October 9, 2003 filing in above-referenced proceedings, ICO Global Communications (Holdings) Limited ("ICO") urged the Commission to reject proposals that would require new entrants to the 2 GHz band, like ICO, to relocate incumbents prior to service commencement in at least the top 100 broadcast markets, rather than in only the top 30 markets as required under the existing plan.¹ In an October 16, 2003 filing, the National Association of Broadcasters ("NAB") and Association for Maximum Television ("MSTV") submitted a report (the "Report") estimating the cost of relocating 2 GHz broadcast auxiliary service ("BAS")² incumbents nationwide.³ The Report, however, confirms what ICO has warned the Commission would occur if it mandates a single-phase, nationwide relocation of 2 GHz BAS incumbents—that new 2 GHz MSS entrants already struggling to overcome a difficult financing market would be forced to shoulder the additional, extraordinary cost burden of an unnecessarily onerous single-phase relocation. Moreover, this cost burden would be imposed long before the new 2 GHz MSS entrants have had a chance to earn a dime of revenues to fund the relocation.

¹ Letter from Suzanne Hutchings, ICO, to Marlene Dortch, Secretary, FCC, ET Docket No. 95-18, IB Docket No. 01-185, and WTB Docket No. 00-258 (Oct. 9, 2003) ("ICO Letter").

² BAS spectrum in the 2 GHz band is also authorized for use by cable television relay services ("CARS") and local television transmission services ("LTTS"). For purposes of the 2 GHz BAS relocation plan, the Commission typically refers to BAS, CARS, and LTTS collectively as BAS. *See Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, 12318-19 ¶ 10 n.24 (2000) ("Second R&O").

³ Letter from Lawrence A. Walke, NAB, to Marlene Dortch, Secretary, FCC, IB Docket No. 01-0185, ET Docket No. 95-18 (Oct. 16, 2003) ("NAB Letter").

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I. The Report Is Fundamentally Flawed and Grossly Underestimates Total Relocation Costs under a Single-Phase Relocation Plan

Under the existing relocation plan, the first 2 GHz MSS entrants were expected to incur BAS relocation costs of approximately \$15 to \$20 million before commencing service. In adopting the existing relocation plan, the Commission expressly declined to mandate a nationwide relocation plan in order “to minimize costs to the extent possible for MSS licensees, and to defer costs where possible so that they can be paid on an ongoing basis, rather than in a lump sum.”⁴ Rather than allay concerns regarding the enormous cost burden of a single-phase relocation plan, the Report estimates that BAS relocation costs could be *at least* \$512 million under a single-phase relocation plan—25 to 35 times the estimated costs under the existing plan.

The Report acknowledges that its cost estimate does not even account for BAS equipment of “duplicates, state and national networks, cable entities, low power stations, and television stations licensed in Puerto Rico.”⁵ The Report further notes, as an example, that the costs of relocating BAS equipment operated by the television networks are not included in its estimate, but could amount to an additional \$7 to \$10 million.⁶ The Report thus confirms ICO’s observation in the ICO Letter that the record lacks a comprehensive accounting of 2 GHz BAS operations, particularly those of cable and television networks, independent BAS operators, and LTTS, CARS, and fixed STL licensees.

Significantly, the Report is fundamentally flawed and grossly underestimates the costs of relocating 2 GHz electronic news gathering (“ENG”) devices. The Report’s cost estimate is based on a survey to which only 27% of the total number of full-power television stations in the United States responded. Rather than projecting the total number of 2 GHz ENG devices nationwide based on the survey response rate, the Report inexplicably based its projection on the number of “known 2 GHz users,” which are limited to only those licensees that originate local news.⁷ This methodology undercounts the total number of 2 GHz ENG devices in at least two ways. First, had the Report properly based its projection on the overall survey response rate, it would have calculated that the total number of ENG devices nationwide is approximately *four* times the number of reported ENG devices. Instead, the Report used an incorrect and misleading mathematical calculation that estimated, for example, the number of ENG devices in the top 10 markets to be merely one and a half times the number of reported ENG devices in those markets.⁸ If properly calculated using the Report’s own data, the total relocation costs of a single-phase relocation plan could be well over *\$1 or \$2 billion*, rather than merely \$512 million.

⁴ See *Second R&O*, 15 FCC Rcd at 12325 ¶ 27.

⁵ See Report at 3 n.8.

⁶ *Id.* at 1 n.1.

⁷ *Id.* at 6.

⁸ *Id.* at 4, 8.

Second, by assuming that “known 2 GHz users” consist of only licensees that originate local news, the Report fails to account for licensees that operate ENG equipment, but do not originate local news. ENG licensees are not required to originate local news programming and in fact may use that equipment for non-news programming purposes. There also may be television stations that have cut back on or suspended their local news programming, but continue to own ENG equipment with the intent of resuming local news programming and ENG operations under more favorable economic conditions. Some licensees may have no affiliation at all with television stations, but rather lease 2 GHz radio equipment to users across a specific region on an as-needed basis. Thus, the Report’s projection methodology is based on a fundamentally flawed assumption that cannot possibly yield an accurate estimate.

II. Mandating a Single-Phase BAS Relocation Plan Is Premature

Notwithstanding the enormous cost burden, mandating a single-phase relocation plan is premature, at least until the Commission resolves the pending petitions for reconsideration of the *Third 3G Order*⁹ and confirms whether to reallocate a portion of the 1990-2025 MHz band for broadband PCS, advanced wireless services, or incumbents displaced from other bands. In fact, mandating a single-phase relocation plan would unfairly prejudice the outcome of the pending petitions for reconsideration of the *Third 3G Order* because it is premised on the assumption that the Commission will not reconsider its reallocation of 2 GHz MSS spectrum. If the Commission requires a single-phase relocation, but later decides to retain all or most of the original 2 GHz MSS allocation, 2 GHz MSS licensees would be forced to implement a costly relocation scheme that is no longer necessary.

Moreover, until the Commission decides on specific uses of the 2 GHz band, affected parties are unable to offer meaningful comments on implementing a nationwide relocation plan. For example, ICO previously proposed in the 3G proceeding that, if reallocation of 2 GHz MSS spectrum is necessary, the Commission should reallocate the spectrum for use by displaced federal government incumbents, who are unlikely to require immediate use of the spectrum.¹⁰ Adoption of this proposal could avoid any need to mandate a single-phase, nationwide relocation plan.

Furthermore, if the Commission reallocates 2 GHz spectrum for use by unlicensed services, displaced MDS incumbents, or Nextel, it is unclear whether or how those new services will share the costs of BAS relocation. Until affected parties know what new

⁹ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Third Report and Order, 18 FCC Rcd 2223 (2003) (“*Third 3G Order*”).

¹⁰ See Comments of ICO Global Communications (Holdings) Limited at 30-31, *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, ET Docket No. 00-258 *et al.* (Oct. 22, 2001); Reply Comments ICO Global Communications (Holdings) Limited at 10-11, *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, ET Docket No. 00-258 *et al.* (Nov. 8, 2001).

services will be permitted in the 2 GHz band, they cannot properly assess how the BAS relocation plan should be modified to accommodate those new services.

III. The Commission Should Provide Adequate Notice and Invite Additional Comments Before Mandating a Single-Phase BAS Relocation Plan

The recent NAB Letter and similar filings neither provide an adequate record nor constitute notice sufficient to warrant the Commission's adoption of a wholesale re-working and expansion of 2 GHz relocation obligations. ICO again urges the Commission to formally provide notice of and seek comment on any planned changes in 2 GHz relocation rules and policies.

A single-phase BAS relocation plan raises new questions that neither the Commission nor other parties previously have addressed or considered at any length, such as:

- (1) the allocation of relocation responsibilities among MSS licensees and other new entrants in the 2 GHz band;
- (2) whether and how MSS licensees and other new entrants would share relocation costs on a pro rata basis;
- (3) the coordination of relocation negotiations among affected parties;
- (4) the establishment of timeframes for providing relocation compensation to BAS incumbents or relocation reimbursement to the first new entrants;
- (5) the coordination of nationwide relocation efforts of MSS licensees with market-by-market relocation efforts of other new entrants;
- (6) how the impact of relocation costs can be minimized for the first new entrants;
- (7) whether digitization of BAS equipment should be required to implement BAS relocation;
- (8) whether MSS licensees and other new entrants should be required to pay for digital equipment that BAS licensees already have purchased or will purchase in the ordinary course of business;
- (9) whether MSS licensees and other new entrants should be required to replace obsolete BAS equipment;
- (10) what specific standards should be applied in determining which BAS equipment should be eligible for relocation compensation; and
- (11) whether BAS licensees should be required to provide the Commission and MSS licensees with an inventory of existing BAS equipment prior to implementation of a single-phase relocation plan.

Although BAS incumbents have predicted dire consequences, particularly with respect to interference issues, if the top 100 markets are not changed at once and in a single step, evidence in the record suggests that the manufacturing capacity does not exist to support a physical equipment change-out of this magnitude in a short time frame. In fact, the record indicates that the capacity does not currently exist.¹¹ Moreover, there has been no discussion or technical input on the record of the possibility that a phased relocation 2 GHz incumbents out of the top 30 broadcast markets followed by a broader relocation of remaining markets may actually alleviate harmful interference between adjacent markets.¹²

In the *Third 3G Order*, the FCC stated that it would address 2 GHz BAS relocation issues in “a future separate proceeding,” thus signaling its intent to initiate a separate proceeding to solicit additional comments and address the outstanding relocation issues. Immediate adoption of final rules that greatly expand or accelerate relocation responsibilities, absent an opportunity for formal public notice and comment, would violate the notice requirements of the Administrative Procedure Act (“APA”).¹³ Adequate notice requires that the rule adopted must be a “logical outgrowth” of the rule proposed.¹⁴ Under the logical outgrowth standard, the test is whether the agency’s notice would “fairly apprise interested persons of the subjects and issues.”¹⁵

The *3G FNPRM*¹⁶ is inadequate to provide the requisite notice for a radical overhaul of the existing BAS relocation plan. It did not seek comment on any specific proposals for implementing a single-phase relocation plan or whether such a plan would be necessary at all under certain 2 GHz reallocation scenarios, such as in the event that the FCC reconsiders the reallocation of 2 GHz MSS spectrum or decides to reallocate a

¹¹ See Letter from Jeffrey A. Krauss, Telecommunications and Technology Policy, to Marlene Dortch, Secretary, FCC, Attachment, Slide 20 (June 19, 2002).

¹² Tests of the latest generation of 2 GHz radio equipment indicate that “[...]digital] and analog trucks can co-exist with just a few degrees of azimuth separation on adjacent channels with no noticeable degradation to either system.” Ron Merrell, *Digital TV: CBS News Nets Benefits of COFDM*, digitaltelevision.com (Feb. 2002), at www.mrcbroadcast.com/web_articles/Articles/COFDM/CBS_News_Nets_Benefits.PDF.

¹³ The APA requires the Commission to publish an NPRM containing the “terms or substance of the proposed rule” and an opportunity for public comment on the proposed rule. See 5 U.S.C. § 553(b)(3), (c).

¹⁴ See *Nat’l Black Media Coalition v. FCC*, 791 F.2d 1016, 1022 (2nd Cir. 1986) (citation omitted) (“if the final rule deviates too sharply from the proposal, affected parties will be deprived of notice and an opportunity to respond to the proposal.”). A final rule is not a logical outgrowth “when the changes are so major that the original notice did not adequately frame the subjects for discussion.” *Connecticut Light and Power Co. v. Nuclear Regulatory Comm’n*, 673 F.2d 525, 533 (D.C. Cir.).

¹⁵ *Nat’l Black Media Coalition*, 791 F.2d at 1022 (quotation and citation omitted). Even where comments submitted by other parties propose specific changes to the BAS relocation plan, those comments “do not satisfy an agency’s obligation to provide notice.” *Id.* at 1023. An agency “must *itself* provide notice of a regulatory proposal...it cannot bootstrap notice from a comment.” *Id.* (quotation and citation omitted).

¹⁶ See *Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, Including Third Generation Wireless Systems*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 16043 (2001) (“*3G FNPRM*”).

portion of 2 GHz MSS spectrum for use by displaced federal government operations.¹⁷ As noted above, affected parties cannot possibly offer meaningful comments on implementing a nationwide relocation plan until the Commission decides on the specific uses of the reallocated 2 GHz MSS spectrum.

ICO again urges the Commission to develop a record that adequately addresses the logistics, interference issues, and cost issues involved in a single-phase relocation, rather than take action based on more than a back-of-the-envelope cost estimate lacking broader input from the full range of affected parties.

In accordance with section 1.1206(b) of the Commission's rules, an electronic copy of this letter is being filed.

Very truly yours,

/s/ Suzanne Hutchings

Suzanne Hutchings

cc: Ed Thomas
Bruce Franca
Julius Knapp
Geri Matise
Bruce Romano
Alan Scrim
Gary Thayer
Jamison Prime
Breck Blalock
Howard Gribhoff
Paul Locke

¹⁷ The 3G *FNPRM* merely sought comment on "changes that would have to be made to the Commission's [2 GHz relocation] plan" if the Commission were to reallocate a portion of the 2 GHz MSS band. *Id.* at 16057 ¶ 32.